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No. 92-1316

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

NELSON R. RABY, *et al.*,

Petitioners,

v.

M/V PINE FOREST, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED: RESPONDENTS' COUNTERSTATEMENT

1. Whether this Court should recognize a federal maritime tort of blacklisting which punishes conduct consisting solely of truthful, relevant statements written in response to a lawful governmental request for information.

2. Whether a court of appeals' unwillingness to elaborate upon its reasons for overturning a small back wages award, which can be shown by simple arithmetic to be clearly erroneous, is a ground for granting certiorari, especially when the petition makes no attempt to show that the back wages award was not clearly erroneous.

3. Whether the signing of a receipt for a specified wage should be treated as a "demand" for half of that wage within the meaning of 46 U.S.C. §10313(e).

4. Whether a seaman is entitled under 46 U.S.C. §10313(f) to the balance of his wages from his employment on a vessel only at the time his employment terminates.

5. Whether the release of seawater used for ballast by a vessel should be treated as a discharge of "cargo" within the meaning of 46 U.S.C. §10313(f).

Pursuant to Sup. Ct. R. 29.1, notice is given that:

1. The parent company of Delica Shipping, S.A. is Transocean Bulk Carriers, S.A., which owns 100% of the stock of Delica Shipping, S.A. Delica Shipping, S.A. has no subsidiaries or affiliates.

2. Inui Steamship Co., Ltd. owns 100% of the stock of Transocean Bulk Carriers, S.A. Inui Steamship Co., Ltd. has no parent corporation.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

Respondents M/V PINE FOREST, Delica Shipping, S.A. and Inui Steamship Co., Ltd. respectfully request that this Court deny the plaintiffs' petition for writ of certiorari to review portions of the decision and opinion rendered in this case by the Ninth Circuit Court of Appeals on October 14, 1992, and reported at 978 F.2d 462.

COUNTERSTATEMENT OF THE CASE

This Counterstatement focuses on those factual and record matters most relevant to the certiorari decision, but provides a very brief introductory summary of the case for the Court's convenience. A more detailed overview of the case appears in Respondents' Cross-Petition for Writ of Certiorari, which is incorporated by reference.

This case arises out of the ongoing economic contest between Western seamen's unions led by the London-based International Transport Workers Federation (the "ITF") and a tacit alliance of flag of convenience ("FOC") vessels and Asian nations supplying crews for those vessels. As part of a campaign to destroy flag of convenience shipping and recapture seafaring jobs for Western seamen, the ITF sought to force FOC vessels to pay wages comparable to those demanded by Western European unions. Vessels which did not pay these wages would be denied loading, unloading and pilotage services in those Western ports where ITF affiliates had the power to enforce the campaign.

Asian manning agents devised an "ITF program" to counter the ITF campaign. They arranged for the creation of fictitious wage documents – such as wage receipts and shipping articles – to make ITF inspectors believe that their clients were paying ITF wages when they were actually paying a much lower, Asian rate. This case involved an FOC vessel called the PINE FOREST. The vessel was registered in Vanuatu, beneficially owned by Japanese interests and manned by a Filipino crew which had agreed to participate in the generation of fictitious wage information. That crew worked on the vessel without incident for the first ten months of its twelve-month engagement, receiving its agreed-upon wage monthly while signing receipts for both that wage and the ITF wage. Then, suddenly, while the vessel was stopping in Tacoma, several crew members filed suit for the ITF wages they had been pretending to receive and for tort damages as well.

A. Petitioners' Misstatements of Fact and of the Record

In their depositions and at the trial, the seafarers presented no evidence that they had ever had any objection to their jobs, to their wages or to their roles in the ITF program until they met Richard J. Dodson, a Louisiana lawyer who had arranged to be in Tacoma while the PINE FOREST was there. Their complaint claimed, however, that they had been promised the ITF wage, that the promise was fraudulent, and that they had been forced to sign the false wage receipts by threats that they would not be given any pay if they did not do so.

These allegations were shown to be completely false by depositions of the seamen taken only two weeks after the complaint was filed. They were not repeated in the

pre-trial order or in testimony at trial. Despite the trial court's extraordinarily favorable award to plaintiffs, it did not find that there had been such a false promise or that the seamen had been forced to sign the wage receipts.

Nevertheless, the allegations surfaced again on appeal, this time embroidered with new misstatements of the facts and the record. For example, the Dodson plaintiffs argued in the Ninth Circuit – as they have argued here – that the fictitious wage information which defendants' manning agent and crew created was unrelated to ITF disruption of FOC shipping.[1] They asserted, although the record was clearly to the contrary, that defendants had never been injured by the ITF and that "ITF harassment" was just defendants' euphemism for a demand that seamen be paid their agreed-upon wages. They never attempted to explain, however, why the manning agents would go to the trouble of creating fictitious wage information, if it was not to fend off ITF "industrial action." Plaintiffs admitted that they were quite willing to work for the wage they were in fact paid and thus there was no need or point in trying to deceive them.

Among the most outrageous assertions on appeal is the one that attempts again to explain away the seafarers' signing of the false wage receipts and at the same time establish a basis for the trial court's award of $14,300,000 in mental distress and punitive damages. This new assertion was that the seamen signed the receipts because defendants had threatened to fire and blacklist them if they objected. Although the assertion has been

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[1] Their co-plaintiff, AMOSUP, the Philippines union that had joined the action in the names of eight other former or current PINE FOREST crewmembers (called the "AMOSUP Plaintiffs" in this case), took the opposite tack. It candidly conceded that the fictitious wage information was directed at the ITF.

made repeatedly in Mr. Dodson's briefing, it has never been supported by any evidence whatsoever. No seaman ever testified that he was threatened, coerced, oppressed or mistreated in any manner. Specifically, not one seaman testified that he was told that he would be fired or blacklisted if he did not sign a wage receipt or if he complained about the wage he actually received. Nor was there any evidence to support the assertion in this Court that defendants had a policy of blacklisting any seaman who failed to go along with the ITF program or filed suit for the ITF wage.

Plaintiffs' counsel repeatedly pleaded that the seamen had demanded the full ITF wage each month. But plaintiffs' depositions contradicted this. No seaman would testify that such a demand had been made. It turned out that what plaintiffs' counsel was calling "demands" were the false receipts the seafarers had signed.

Finally, plaintiffs' briefing has repeatedly attempted to create the false impression that they were fired for bringing this action. This attempt also contradicts the record and the admission in the pre-trial order and the instant certiorari petition that they requested repatriation on filing this action. Plaintiffs were not fired. At their counsel's direction, they quit, leaving defendants to find essential replacements while stranded in a foreign port.

B. The Notations in the Seamen's Books

Petitioners' so-called "blacklisting" claim arose when they left the PINE FOREST, nine days after they had arrested the vessel. The Philippines Coast Guard requires Filipino seamen to carry a seaman's book, with a page for each vessel on which they ship. That page requests information under various headings, including the heading,

"CAUSE OF DISCHARGE." Next to that heading the master entered the notation: "Requested repatriation upon filing wage claim to arrest vessel."

Petitioners have not claimed in this lawsuit that the captain did not have an obligation under Philippine law to write something next to that heading. Nor that the statement that was made was unresponsive or offered more information than was called for by the coast guard. They have never claimed that the statement was false in any respect; and in their petition plaintiffs now admit that it was true. Nor have the seafarers in any of their papers suggested a truthful, responsive notation that should have been made instead of the one they criticize.

Petitioners did not complain that the notations caused any of them to lose a particular job that he would have taken. Instead, they claimed that the notations would prevent them in the future from ever securing a seafaring job from anyone. Their claims were accepted by the trial court, which awarded the thirteen of them – all able-bodied workers – a total of $6,800,470 as damages for lost future-income. This was based on their economic expert's assumptions that the seamen would be unemployable for the remainder of their working lives at any job, that they would have been paid ITF wages in every future job, and that they would have been constantly employed twelve months a year until they retired. There was no evidence at trial to support any of these assumptions. In addition, it appears that of the undifferentiated total judgment of $1,300,000 for mental distress and $13,000,000 for punitive damages that the court also awarded them, $650,000 in mental distress damages and $6,500,000 in punitive damages were attributed to the notations.

From the beginning, defendants had purely legal objections to the blacklisting claim: to the applicability of

American law to the issue (both under general conflicts principles and also under the rule that a vessel is ordinarily governed by the law of its flag); to the propriety of an American court's entertaining a claim so intimately related to Philippines facts, parties, witnesses and policies; to the correctness of exercising admiralty jurisdiction where the injury was projected to occur on land in a foreign country; and to the doctrinal validity and constitutionality of the claim even under American law, where it was obvious that the notations were true and had been made in response to a valid governmental request.

After the trial, defendants could add to this list strictly evidentiary objections – for on the great bulk of the factual issues, plaintiffs had failed to introduce sufficient evidence to support their claim. To better understand the bona fides of the blacklisting claim, see the parties' relevant appellate briefing below, at pp. 1a-17a of the Appendix.

C. The Back Wages Paid by Defendants Shortly After Suit Was Filed and the Award of Additional Wages

On February 13, 1990, two weeks after the PINE FOREST was arrested, defendants paid Mr. Dodson on demand the sum of $267,586. This sum was supposed to represent the difference between the amounts his clients had been paid each month and the amounts they would have been paid under the ITF wage scale they claimed to be applicable. On May 8, 1990, however, their damages expert, G. Randolph Rice, testified in a deposition that plaintiffs had been overpaid by $15,610. Tr. Ex. 28, Rice 4, 5, ex. 3 (introduced at trial as Tr. Ex. 6A). See p. 51a, below. Plaintiffs' counsel on the record

confirmed this ("In other words, we were overpaid slightly . . ."). *Id.* 5:25, 6:1-4, Ex. 3.

In a set of Proposed Findings of Fact filed before trial, Mr. Dodson's plaintiffs state that they were fully paid their back wages. DN 149/150, p. 7, para. 7. In the pre-trial order and at trial, they made no further claim for back wages. Dr. Rice testified again that they had been overpaid. Tr. 92-93, Tr. Ex. 6A. Mr. Dodson, in closing for all plaintiffs, asked for back wages for the AMOSUP plaintiffs, but not for his own clients. Tr. 374.

Thirty-five days later, on June 27, 1990, Mr. Dodson filed a proposed set of findings and conclusions which claimed that his clients were still due back wages of $7,206.02. ER 831-832. This amount allegedly represented wages from January 24, 1990, to February 8, 1990, which he now alleged were not included in the $267,586 he had accepted on February 13, 1990. He did not claim this to be consistent with Dr. Rice's calculations which determined plaintiffs' wages not through January 24, 1990, but through February 16, 1990. See p. 51a below. The issue was important, because if any amount of back wages was found still to be due, it would partially support an award of perhaps millions of dollars in penalties under 46 U.S.C. §10313(g).

In its Findings and Conclusions, the trial court accepted the finding that the individual plaintiffs were entitled to additional back wages, but instead of the $7,206.02 claimed by Mr. Dodson, it found without explanation that the individual plaintiffs were still due $15,019.20. When the specific individual back wages awards to each of these seamen were listed in a later Finding, however,

they totaled not $15,019.20, but $23,696.09. FF 33 pp. 9-10.[2]

Determination of the back wages due the plaintiff would have been a simple proposition once the amoun they should have been paid each month was multiplie by the number of months they worked and the produc reduced by the amount they were actually paid. Thus if a particular plaintiff should have made $2,000 pe month, worked for 11 months and was paid only $1,00 per month, the back wages due him would be easil calculated as $11,000. Complications were created though, by the fact that ITF compensation consisted o several elements that had to be derived from various sec tions of a model ITF agreement and its annexes and b the fact that there was disagreement at various points o the starting and ending dates of the seamen's employ ment on the PINE FOREST.

To avoid these complications, defendants in thei opening brief on appeal simply accepted the Dodso plaintiffs' position on the amounts each seaman shoul have been paid each month. Defendants then calculate back wages due based on the employment starting an ending dates the Dodson plaintiffs had urged at variou points in the litigation. These calculations showed tha under any of the possible assumptions, these plaintiff had been overpaid and were due nothing. These calcula tions, all of which were presented to the Ninth Circui panel, appear at pp. 24a-27a, 30a-40a of the Appendix.

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[2]Judge Jack E. Tanner presided at the trial. Defendan assigned his prejudice, partisanship and general judicial misconduc as grounds for reversal or, minimally, for assignment of a ne judge should there be a remand. The Court of Appeals reversed o the merits, there was no remand and these issues were no addressed.

The Dodson plaintiffs asserted in response that defendants had used the wrong number of months in their back wages calculation. They did not demonstrate, however, by performing a calculation using the allegedly correct numbers, that the $267,586 was an underpayment. See 41a-44a, below.[3] In their Reply Brief defendants took plaintiffs' numbers, performed the calculation, and showed that even with plaintiffs' new figures, the $267,586 remained an overpayment. See 45a-49a, below.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THERE IS NO CONFLICT IN THE CIRCUITS ON WHETHER THE MERE IMPARTING OF TRUTHFUL INFORMATION CAN CREATE LIABILITY FOR THE TORT OF BLACKLISTING

The Court of Appeals avoided a thicket of jurisdictional, procedural, evidentiary and substantive issues raised by plaintiffs' blacklisting claims by simply holding in accord with the second Restatement that imparting truthful information, no matter its motive, cannot in itself constitute an illegal interference with prospective contractual relations. Restatement (Second) Torts §772(a). Petitioners claim that this holding conflicts with the First Circuit's decisions in *Carroll v. Protection Maritime Ins. Co.*, 512 F.2d 4 (1st Cir. 1975), and *Pino v. Protection Maritime Ins. Co.*, 599 F.2d 10 (1st Cir. 1979), and the Fifth Circuit's decision in *Smith v. Atlas Off-Shore Boat Service*, 653 F.2d 1057 (5th Cir. 1981). They also claim, citing two cases, that Section 772(a)

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[3] Although the Dodson plaintiffs claimed that they were owed additional back wages, they did admit that the trial court award was erroneous. See p. 43a, below.

has been disapproved by State courts. None of thes assertions are true.

There is no conflict between the Ninth Circuit and an other circuit regarding the soundness of Section 772(a) In *Carroll*, seamen who had earlier brought persona injury actions against their employers sued a number o insurance companies. The carriers were alleged to hav notified vessel owners that they would not cover some o the plaintiffs and would cover others only at supranorma rates. 512 F.2d at 5. As a result, plaintiffs alleged, ves sels discharged them or refused them employment. *Ibid* The First Circuit ruled that plaintiffs had stated a prim facie case of interference with contractual relations. *Id* at 6. It noted, however, that because of the posture o the case it was not passing on the applicability of an possible defenses.

The conduct in *Carroll* consisted of far more than fu nishing truthful information. There defendants use their economic power to force plaintiffs' employers no to hire them. *Pino* was very similar, involving the sam defendant insurers, who were again deterring vesse owners from hiring seafarers by charging their prospectiv employers higher premiums when they did so. The issu of whether the mere imparting of truthful informatio was a defense was not raised or discussed. Again, sinc the conduct complained of consisted of the naked use o economic power to force employers to deny the plaintif jobs, it would not have been protected by the Sectio 772(a) defense in any event. Thus any pronouncemen on the subject would have been *obiter dictum*.

The *Smith* case did not involve interference with pro pective contractual relations, but an alleged wrongful di charge. Plaintiff's claim was that he had been discharge

by the defendant employer, because he had refused to settle a personal injury claim and had instead sued the defendant under the Jones Act. The court held that this ground for discharge was against public policy and therefore tortious. The imparting of truthful information was not a part of the challenged conduct and was not raised as a defense.

Since neither *Carroll, Pino* nor *Smith* involved Section 772(a), the Ninth Circuit created no conflict with any of those cases by following Section 772(a) in this case. Plaintiffs do not cite any federal decision expressing a reservation about the soundness of the section. Defendants have not found any. Nor have the parties found a state court which does so.

Plaintiffs mistakenly claim that *Scussell v. Balter,* 386 So.2d 1227 (Fla.App. 3d Dist. 1981), and *Yaindl v. Ingersoll Rand Co.,* 422 A.2d 611 (Pa. Super. 1981), are state cases which refused to follow Section 772(a). *Scussell* did not even involve 772(a); it involved 772(b) which makes it an absolute defense to give a third person "honest advice within the scope of a request for the advice" even if the adviser intends to interfere with a prospective contractual relation. In *Scussell,* the Court held not that Section 772(b) was not good law, but that the section was "inapplicable" to the facts of that case, because of "Scussell's active involvement in Wolf's affairs and of his personal motivations and ulterior purposes for securing Wolf's withdrawal from the undertaking with" plaintiff. 386 So.2d at 1228-29. The *Scussell* court is no more specific than this about the facts, but the references to "active involvement" and "ulterior purposes" suggest that defendant did not meet the requirements of the defense, in that advice was not requested, but volunteered, and may not have been "honest." In any event,

the reference to the section's inapplicability implici meant that it would be applied when the facts warrant it.

Yaindl is typical of many cases plaintiffs have cited this case. Not only does it not support their position takes the opposite position. The communications in th case were either false or were threats to use econon power against a potential employer. The case specifica discusses Section 772(a), but rather than disapprove expressly invokes it as the law of Pennsylvania. 422 A. at 623, n.14 ("Of course, were the jury to conclude th Sheedy imparted only truthful information to Desh Sheedy's interference would not be improper. Resta ment (Second) of Torts §772 (1979)".)

In this case, of course, the facts are stronger th required by Section 772(a), because the truthful inform tion was imparted in response to a request by a gove mental body. Thus even if there were a decision ho ing that truthful statements in themselves could co stitute a tortious interference, it might well be disti uishable and therefore not in conflict with the Nin Circuit's view in this case. But even that decision has n been shown to exist. Additional cases which ha acknowledged the authority of Section 772 inclu *Liebe v. City Finance Co.*, 98 Wis.2d 10, 295 N.W. 16, 20 (Wis. App. 1989); *International City Manag ment Asso. Ret. Corp. v. Watkins*, 726 F.Supp. 1, (D.D.C. 1989); *Allen v. Safeway Stores, Inc.*, 699 P. 277, 280 (Wyo. 1985); *C.R. Bard, Inc. v. Wordtron Corp.*, 235 N.J. Super 694, 561 A.2d 694, 697 (198 *George A. Fuller Co. v. Chicago Coll. of Osteopath Medicine*, 719 F.2d 1326, 1332 (7th Cir. 1983). Becau of the Restatement's position and the cases adopting the law in this area is already uniform, and it is likely

continue to be uniform. Concerns about uniformity, therefore, would not suggest that this Court should devote its limited resources to the subject.

II.
THE CONSIDERATIONS RELEVANT TO THE BLACKLISTING QUESTION HAVE NOT MATURED SUFFICIENTLY TO JUSTIFY REVIEW NOW

Plaintiffs seem to be making two related arguments: first, that the Restatement (Second) is simply wrong not to punish truthful communications if they are motivated by desire to injure; second, that even if the Restatement might be correct generally it should not be followed where the communication, however, truthful, might deter seamen on foreign vessels from suing under Section 10313.

Neither of these issues has really been confronted in a written opinion by any federal or state court, not even by the Ninth Circuit panel which wrote the decision in this case. Defendants' opening brief in the Ninth Circuit raised the Section 772(a) defense in a brief statement of the relevant doctrines. Plaintiffs in their response ignored defendants' doctrinal argument and authority, including Restatement Section 772(a). See pp. 7a-15a, below. The Ninth Circuit, having been presented with no attempt to challenge or distinguish Section 772(a), simply followed the Restatement and found that the notations were not an "improper" interference with plaintiffs' employment prospects. The court did not identify, analyze, or discuss the underlying constitutional and policy issues. 978 F.2d at 475. The first time plaintiffs attacked the Restatement was when they petitioned the Ninth Circuit for rehearing. The motion was denied without opinion.

Thus, if this Court grants certiorari to decide whethe the truthfulness of defendants' notations should be a absolute defense to a maritime tort of blacklisting, will be the first court to address and consciously resolv the policy and constitutional issues raised. It will no have the benefit of any court's analysis of the issue, no of the community's experience with that court's dec sion. In the absence of some emergency or some pres ing and chronic social problem, none of which has bee shown by plaintiffs, this by itself is grounds for denyin the writ.

But there are additional reasons why this is not th appropriate time to pass upon the soundness of 772(a First, the question raised is one which should not hav been reached below. The alleged tort involves solel foreign parties on a foreign vessel. In the absence of fed eral legislation providing otherwise, the law applied t the notations should have been foreign law. In addition even if foreign law was not controlling, there was n admiralty jurisdiction and thus no occasion to opin about the requirements of an admiralty tort of black listing. This is because the tort could not be completed – and therefore would not occur – until the plaintiff sea men were denied jobs on land in the Philippines. Thus the alleged tort did not occur on navigable waters and th locus requirement of admiralty law was not satisfied *Sisson v. Ruby*, 497 U.S. 358, 362-363 (1990); *Execu tive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S 249, 261 (1972) (maritime locality necessary, though no sufficient).

III.

THE BLACKLISTING ISSUE IS NOT OF SUFFICIENT IMPORTANCE TO JUSTIFY THIS COURT'S REVIEW AT THIS TIME

Petitioners have presented no evidence that there is a significant problem of blacklisting – whether by truthful statements or otherwise – which is of such importance that it requires this Court's attention. There is no showing that American seamen are not adequately protected from unfair employment practices by federal labor legislation and collective bargaining agreements. Nor that most foreign seamen today do not also have adequate protections. In this case, the Filipino seamen have recourse to the facilities of the Philippine Overseas Employment Administration, to which their manning agents and the vessel owners are subject.

Plaintiffs may argue that they cannot expect a sympathetic response from the POEA, because the POEA has supported vessel owners when Filipino seamen have violated their agreements with their manning agents and sought ITF wages in a foreign port. But this has not been established on the record. Nor has there been any showing that Philippine courts would not give redress against an abusive foreign vessel owner if the POEA did not. The Dodson plaintiffs have in fact cited Philippine cases showing that those courts will protect Filipino seafarers. See their answering brief in the Ninth Circuit. Plaintiffs/Appellees' Original Brief on Merits, pp. 10-11.

But if it were true that the seamen would not be supported at home, this would be an expression of a conscious economic policy. American courts which insisted on giving these Filipino seamen a remedy they would not have in their own country would be acting to undermine that policy. To be sure, plaintiffs claim it to be United

States policy to counter the Philippines' alliance with FOC vessels because flag of convenience shipping allegedly deprives Americans of seafaring jobs they would otherwise have. But this policy argument is based on the legislative history of a statute enacted in 1915 – a statute which merely made the half wages provision of the seamen's wage act – then 46 U.S.C. §597, now Section 10313(e) – applicable to foreign vessels when in a U.S. port. Since then, there have been revolutionary changes in international shipping, labor relations and trade, while the American merchant marine has continued to decline radically. Yet Congress has not attempted to make the half wages act a more effective instrument for whatever ulterior purposes it might have had when enacted. To the extent that Section 597 was meant to provide indirectly a mechanism for equalizing wages, it was proved a failure long ago and in fact was effectively nullified by subsequent immigration and deportation legislation and policy. See 8 U.S.C. §1281 et seq. Brief In Opposition to Petition for Writ of Certiorari in *Su v. M/V Southern Aster*, No. 92-1319, pp. 15-22.

Flag of convenience shipping was not a significant factor in international shipping when Section 597 was enacted. Despite the rise of such shipping to a major role in international overseas trade and the growth of Asian seafaring since that time, the United States has done nothing to discourage such shipping. Indeed, in international conferences, it has refused to support the outlawing of such shipping. Northrup & Rowan, *The International Transport Workers Federation and Flag of Convenience Shipping*, 45-46, 231-232 (Univ. Pa. Phil. 1983). All of this shows that the policy which plaintiffs attribute to Congress is of little or no importance to it today.

In addition, this Court has declared that the struggle between FOC shipping and seamen's unions is one in which the judiciary in this country cannot take sides. *Windward Shipping v. American Radio Assn.*, 415 U.S. 104 (1974). Accordingly, the claim that this Court should protect these plaintiffs from defendants' truthful notations, because their government would not do so, implicates nothing of sufficient importance to justify this Court's attention to their putative cause of action.

IV.

THE NINTH CIRCUIT'S UNWILLINGNESS TO ELABORATE UPON ITS REASONS FOR OVERTURNING THE AWARD OF ADDITIONAL BACK WAGES IS NO GROUND FOR GRANTING CERTIORARI

> The Court of Appeals ruled that the petitioners were entitled to back pay at the full union scale described in the ship's articles. The shipowners paid this amount when they tendered $267,586.

Pet. for Writ of Cert. Appendix, p. A21; 978 F.2d at 472. This was an implicit holding by the court that the award of additional back wages – in either of the inconsistent amounts that the trial court found – was clearly erroneous. That conclusion was made explicit when the court reversed the trial court's entire judgment, except for the attorneys fees. Petitioners claim that the Ninth Circuit's unwillingness to set out its reasons for this conclusion justifies a grant of certiorari. Surely, petitioners must do more than show that the Ninth Circuit did not justify its conclusion; it must also make at least some showing that the court was wrong to overturn the award of additional back wages. This petitioners have not done. They merely assert that the Ninth Circuit "clearly erred," but do nothing to show that there were in fact any back wages due.

The briefing before the Ninth Circuit on this issue is set out in the Appendix pp. 19a-51a, esp. 45a-47a. It shows that the claim that plaintiffs were entitled to additional wages was wholly without merit and that the trial court's unexplained and inexplicable award of such wages was, indeed, clearly erroneous. This is a claim that should never have been made in a court of law. After the petitioners came up with a new theory of the months they had worked, they either never took the trouble, or deliberately refused, to multiply that new number by the ITF monthly wages and then to subtract the amount they had been paid. If they had discharged that elementary responsibility to the courts and to defendants before raising this post-trial claim, they would have known that even under their new theory they had still been underpaid.

Every day courts issue opinions which declare that they will not address assignments of error that are wholly without merit. The Ninth Circuit did not expressly make that ritual declaration here, but it did do so implicitly. In the absence of any showing that the back wages award was supported by substantial evidence, and in light of the fact that the Ninth Circuit was presented with a battery of patently unmeritorious claims, most of which it graciously, if unnecessarily, did address, it should not be required to do any more.

V.

PETITIONERS' BIZARRE INTERPRETATIONS OF THE SEAMEN'S WAGE ACT HAVE NOT BEEN AND ARE NOT LIKELY TO BE ADOPTED BY ANY COURT OF APPEALS AND DO NOT REQUIRE THIS COURT'S ATTENTION.

The plaintiffs argued below that a receipt for wages that the seafarers did not receive and knew they were not going to receive should be treated as if it was a demand under Section 10313(e) – and not only a demand, but a demand for half, not all, of the wages reflected in the receipt. In addition, they argued that since defendants did not pay the wages in the receipt, this amounted to a discharge of the seamen by operation of law requiring that they be paid all of their wages under Section 10313(f) – even though the seamen stayed on the vessel after they signed the receipts and continued to work and accept their normal wage.

Plaintiffs also argued that the seawater used for ballast should be treated as if it were cargo, but actually provided no affirmative reason for this counter-intuitive proposition, other than the assertion that the statute should be construed liberally in favor of seafarers and that the policy of the statute imperatively required it. Only in this Court have they claimed that the word "cargo" is ambiguous. Their assertion that the Ninth Circuit conceded this is just another of the falsehoods about the record and the facts which dot their papers in this case. The Ninth Circuit said not that "cargo" was ambiguous, but that Congress's intention in 1872 when it chose not to use the word "ballast" in the law regulating overseas vessels was ambiguous. 978 F.2d at 469.

Defendants believe that petitioners' "demand" and "cargo" arguments are so frivolous on their face that they

require no further attention. Plaintiffs' argument that every trip their vessel took was a "voyage" was equally unmeritorious, but this is not as apparent on its face, because the word "voyage" is ambiguous if considered only in the context of subsection (f) of Section 10313. The Court of Appeals recognized that in the context of the entire Wage Act, especially subsection (e), a voyage had to be coextensive with the entire term of the seamen's employment – and not with the duration of any particular trip or trips. What the court did not bring out was that this holding is long-settled law which was effectively endorsed by Congress in 1983 when it reorganized and clarified seamen's legislation. The cases go back to the 1838 case of *The Mary*, 16 Fed. Cas. 946 (D.Me. 1838):

> . . . . My opinion is, that the intention of the legislature was, that they [the number of days in which seaman should be paid] should begin to run from the time when the wages become due, that is, from the day when the term of service is completed. They are then of common right entitled to their wages.

See generally *The Annie M. Smull*, 1 Fed. Cas. 983, 984 (1872). The holding has been reaffirmed repeatedly since then.[4] There is no authority – and plaintiffs have

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[4] Among the cases so holding are *The Cubadist*, 252 F. 658, 660 (S.D. Ala. 1918) *aff'd* 256 F. 203 (5th Cir.) *cert. denied*, 249 U.S. 618 (1918); *The Velma L. Hamlin*, 40 F.2d 852, 853 (4th Cir. 1930); *Fitzgerald v. Liberian S/T Chryssi P. Goulandris*, 582 F.2d 312 (4th Cir. 1978); *Shilman v. United States*, 164 F.2d 649, 650-51 (2d Cir. 1947) *cert. denied*, 333 U.S. 837 (1948) (Hand, J.) (statute looks "towards payment to the seaman by his employer, at the termination of the employment, of all of his earned wages"); *Sigalas v. Lido Maritime, Inc.*, 776 F.2d 1512, 1521 (11th Cir. 1985) (wage claims are due and payable upon seaman's discharge);

[footnote continued]

cited none – disagreeing with it. Plaintiffs have argued that the decisions in *Griffin v. Oceanic Contractors*, 458 U.S. 564 (1982) and *Chung Yong Il v. Overseas Navigation Co.*, 774 F.2d 1043 (11th Cir. 1983), *cert. denied*, 474 U.S. 1177 (1986) conflict with the Ninth Circuit's decision here. But mere inspection of those opinions shows the claim to be baseless. In both cases, the plaintiffs' claim arose only after his employment had terminated. These cases are simply additions to the line of authority which the Ninth Circuit followed.

In 1983, Congress enacted a clarification, reorganization and codification of the laws relating to seamen, which was intended to be acceptable to all members of the shipping industry. S. Rep. No. 98-56, 98th Cong., 1st Sess., p. 1, 5-7, 10 (1983). The Senate Report states:

> The pertinent provisions of law have been freely reworded and rearranged, subject to every precaution against disturbing existing rights, privileges, duties or functions and consistent with the general plan of the U.S. Code. However, in our effort to adhere to existing law, we have not chained ourselves to the letter of the statute. Rather, we have chosen to follow its spirit. *Where court decisions*, opinions of officials such as the Attorney General or the Comptroller General, Executive orders, regulations, and well-established administrative practices *have established authoritative interpretations of*

Yoffe v. Calmar S.S. Corp., 23 F. Supp. 629, 630-31 (N.D. Cal. 1938) (statute operates "at the time the seaman leaves the ship and shipowner's liability under the statute must be determined as of that time."); *Golden v. Newport Tanderks Corp.*, 1973 AMC 1030, 1033 (N.D. Cal. 1972) (no double wage penalties when statute complied with as of time seaman left ship); *Alier v. Sea Land Service, Inc.*, 465 F. Supp. 1106, 1111 (D.P.R. 1979) (date that seaman leaves the ship "fixes the operation of the statute.")

> *these statutes, we have not intended to overrule them without expressly so providing.*

Id. at 9 (emphasis added). The reenactment of the Seaman's Wage Act with virtually no change from 1915, the last time it was revised, and with no relevant change since 1790, is an implicit declaration of what the Senate Report states – all established precedent is in effect codified thereby.

Thus the statutory holdings that plaintiffs want this Court to review are solid, sound law. Although the Ninth Circuit is the first to make some of them, there is no reasonable likelihood that other circuits will reach a different result on questions whose answers are as clear as these. This Court's review to assure uniformity would seem, therefore, to be unnecessary.

VI.

BECAUSE OF THE ABSENCE OF ANY SIGNIFICANT AMERICAN INTEREST IN THE OUTCOME OF THIS CASE, NONE OF THE QUESTIONS PRESENTED BY PETITIONERS SHOULD BE REVIEWED.

What has already been said about specific questions for which plaintiffs seek certiorari suggests and supports the more general point that none of the questions presented belongs in this Court. This is because the underlying facts in this case are not of significant interest to the United States and have only been made to appear otherwise by shrewd, if censurable litigation tactics.

Plaintiffs' purported claims when they filed suit in Tacoma were for wages they had not been paid under the articles and for fraud and emotional distress. Because all of the parties were foreign nationals or corporations and the litigated events and transactions occurred in the Philippines, Japan or on a vessel of foreign registry, the law

governing these claims was not American law. *Jose v. M/V Fir Grove,* 801 F. Supp. 349 (D. Or. 1991). The appropriate forum for this case, accordingly, would not have been an American forum. To be sure, an American admiralty court would have had the power to entertain the lawsuit. But absent violation of American law giving the action an American anchor, it would have been highly unlikely that such a court would have ignored controlling comity and *forum non conveniens* considerations.

Despite plaintiffs' spurious assertions to the contrary, the Seaman's Wage Act did not provide such an anchor. That Act would have come into play only if, while in a United States port, the seamen had demanded half of their unpaid wages, and had been refused, or if their employment on the vessel had been terminated, and the balance of their wages had not been fully paid. 46 U.S.C. § 10313(e) and (f). As we have seen, there was never any demand for half wages, and the seamen's employment had not terminated prior to the filing of the complaint.

Thus when this action was filed, plaintiffs had no bona fide statutory claim and their complaint would have been vulnerable to a motion to dismiss. To create at least a paper basis for mandatory federal jurisdiction, the preposterous constructions of the wage act discussed above were concocted – that a false wage receipt should be treated as a demand, that the seawater used for "ballast" was "cargo," and that a seaman was entitled to the balance of his wages at every stop his vessel might make during his employment.

If the specious tort theories – based on factual allegations to which the plaintiffs would not swear under oath – and the spurious statutory claims – in obvious conflict with the language, structure and history of the wage act – are disregarded, plaintiffs' action at the time it was

filed is reduced to what it in fact was: a suit for breach of a maritime contract. However valid that claim might have been, it was a foreign claim arising out of a foreign dispute involving a foreign country's economic needs and policies. The parties had agreed prior to the voyage that such disputes would be subject to the exclusive jurisdiction of the POEA and Philippines courts.

Reduced to their essence, the questions that petitioners would have this Court decide arise out of a case in which the United States has no significant interest, but in which a substantial amount of federal judicial resources have already been needlessly expended. That does not appear to be the kind of case for which this Court should grant certiorari.

CONCLUSION

For the reasons given, the Court should deny the Petition for Certiorari.

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Respectfully submitted,

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I.

EXCERPTS RE *BLACKLISTING* FROM PARTIES' BRIEFING ON APPEAL IN THE NINTH CIRCUIT

[Editor's note: Typographical errors, especially the numerous ones in Petitioner's Briefing below, have not been corrected.]

EXCERPTS FROM BRIEF OF APPELLANTS (BLACKLISTING)

Page 70, lines 11-13; pages 71 through 74, line 8

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VI.

THE CLAIMS PREDICATED ON THE NOTATIONS IN THE SEAMEN'S BOOKS WERE NOT WITHIN THE COURT'S ADMIRALTY JURISDICTION AND FAILED TO STATE A CLAIM FOR RELIEF BECAUSE THE NOTATIONS WERE TRUE

* * * *

A. The Court Had No Subject Matter Jurisdiction Over Plaintiffs' "Blacklisting" Claim

In its Findings and Conclusions, the court ruled that it had jurisdiction over the plaintiffs' claims under admiralty and maritime jurisdiction. *See* Conclusion of Law 1.[74] The Findings and the evidence were that the alleged injury to the plaintiffs – the loss of future employment – occurred in the Philippines. Accordingly, the court had no admiralty jurisdiction, because a tort consummated on land is not cognizable in admiralty. *Clinton v. Int'l Org. of Masters, Mates & Pilots,* 254 F.2d 370, 372 (9th Cir. 1958) (intentional interference with contractual relations is not a maritime tort when the alleged harm occurs on land); *Clinton v. Joshua Hendy Corp.,* 285 F.2d 199, 200 (9th Cir. 1960) (no admiralty jurisdiction over claim for interference with contractual relations with union

[74] A review of the transcript will show that before the trial Judge Tanner had indicated the blacklisting claims would not be tried. During the trial he changed his mind. E.g., Tr. 67, 68.

when libelous letter caused expulsion from union, because expulsion occurred on land); *Lamontagne v. Craig*, 632 F. Supp. 706, 709 (N.D. Cal. 1986) *aff'd per curiam*, 817 F.2d 556 (9th Cir. 1987) (no admiralty jurisdiction over defamatory libel where, although libel written at sea, publication and corresponding injury occurred on land).

B. Plaintiffs Had No Colorable Claim, Because, *Inter Alia*, the Notations Were True

Plaintiffs' claim that the notations injured them is a claim that they were injured in their trade or profession by a communication. This is a defamation claim. W. Prosser & W. Keaton, *The Law of Torts*, §112, p. 790-91 (5th ed. 1984); *see Bose Corp. v. Consumers Union of the United States*, 466 U.S. 485 (1984) (product disparagement claim). The notations in the seamen's books were true. Truth is a complete defense to defamation. *See* Restatement (Second) of Torts §§558, 581A, comment a; *The Law of Torts, supra*, §116.

Plaintiffs may argue that the notations constituted intentional interference with prospective contractual relations. But truth is also a complete defense to that tort. Restatement (Second) of Torts §772, and comment b; *The Law of Torts, supra*, §130, p. 1010-1011; *George Fuller Co. v. Chicago College of Osteopathic Medicine*, 719 F.2d 1326, 1332 (7th Cir. 1983). In addition, plaintiffs do not allege or prove interference with a specific contractual expectancy, *see Calbom v. Knudtzon*, 65 Wash.2d 157, 396 P.2d 148 (1964); *King v. City of Seattle*, 84 Wash.2d 239, 525 P.2d 228, 233 (1974), or causation – that is, that they would have been employed by the prospective employer but for the defendant's

intentional and wrongful interference. *Locricchio v. Legal Services Corp.*, 833 F.2d 1352 (9th Cir. 1987).[75]

Plaintiffs may argue that the notations constitute the tort of outrage. Again, however, when the challenged conduct is expression, particularly public expression, truth is a complete defense. *Cf. Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (*false* statement not actionable in claim for intentional infliction of emotional distress). In addition, passing for the moment the question of whether plaintiffs have established the first two elements of this tort, they have not established the element of "severe emotional distress," since they introduced no evidence of *any* emotional distress. See Section VII C, *infra*.

C. The Damages Awarded For Blacklisting Were Not Based on Evidence and Were Entirely Speculative

The damages award for blacklisting was based on the following assumptions.

1. That the 13 individual plaintiffs, all able-bodied men, would never work again.

2. That without the notations, plaintiffs would have received the wages in the model ITF world-wide collective agreement until retirement.

3. That every plaintiff would work 12 months a year every year for the rest of his life.

Each of these assumptions is preposterous and unsupported. There is absolutely no evidence in the record that these plaintiffs could not find some work at some

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[75] One of plaintiffs' witnesses testified that violation of their agreement with their manning agent was widely known in the Philippines and this, irrespective of the notations, would allegedly have made them unemployable. Tr. Ex. 28, Lafferty 73, 83.

time in the future. Although plaintiffs do offer some putative evidence that they could not obtain employment as merchant seamen for the rest of their lives, even that evidence was clearly manufactured for purposes of the trial and even then fails utterly to establish lifetime unemployability. Of the three seamen who testified at trial, only Raby actually "applied" for work. Tr. 229, Tr. Ex. 38, Raby 41 (5/19/90). The "application" was made by presenting his seaman's book to two manning agencies three weeks before trial. Tr. 211, 229, 237-238, Tr. Ex. 38, Raby 42, 51 (5/19/90).[76] When Raby went to these manning agencies, he was accompanied by a large crowd of interested parties, including other plaintiffs, his Philippine lawyer, and James Lafferty, an American lawyer employed by the Seaman's Church and one of plaintiffs' expert witnesses. Tr. 229, 237; Tr. Ex. 38, Raby 40-41 (5/19/90), Alvarado 57-58. The other two plaintiffs had waited downstairs while Raby presented his book and was purportedly turned away. *Ibid.* There was, of course, no evidence whatever from the other 10 individual plaintiffs on this issue.

The two manning agencies were not identified. No plaintiff had ever before worked for either of the two manning agencies. Tr. Ex. 38, Raby 43-44 (5/19/90), Alvarado 58. No written application was made. Nor did any plaintiff apply to Western Shipping, the agency which had employed plaintiffs for years before the lawsuit was filed and the only agency that was ever identified as a prior employer for these plaintiffs. Tr. 212, 237-238, Tr. Ex. 38, Raby 51 (5/19/90). See Statement of Facts.

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[76] In his deposition he admitted that he did not actually want work at that time. Tr. Ex. 38, Raby (5/19/90) 43. One of plaintiffs' witnesses testified that there were 110 to 120 manning agencies in the Philippines. Tr. Ex. 28, Lafferty 42. See also Tr. 211.

The other evidence presented by plaintiffs was a deposition containing the opinion evidence of James Lafferty,[77] who was offered as an expert on Philippine manning practices on the basis of four trips to the Philippines in the preceding several years. Tr. Ex. 28, Lafferty 19. This testimony was contradicted by Frederick Clemo, who testified that because of the skills of these plaintiffs and the high worldwide demand for qualified Philippine crews, he believed plaintiffs would be able to obtain work in two to three weeks. Mr. Clemo had been in the maritime industry for 58 years. Tr. 323. Whether Mr. Clemo's testimony is accepted or not, Mr. Lafferty's speculative opinion, based on his limited experience and hearsay, is insufficient to establish plaintiffs' claim that they would never work again in the shipping industry.

As to the assumption that plaintiffs would have received ITF wages for the rest of their lives, there is no evidence that any of these plaintiffs had ever been paid ITF wages before or had any expectation of ever obtaining them again. The wage scale AMOSUP negotiates for its members is much lower and a Blue Certificate could be obtained by paying that lower wage.

Finally, the assumption that plaintiffs would have worked twelve months per year in the future was wholly unsupported. Plaintiffs had no reason to expect that they would be permanently employed by defendant Delica. Nor did defendants have any legal obligation to employ plaintiffs once their contracts ended. *See, e.g., Smith v. Atlas Offshore Boat Service, Inc.*, 653 F.2d 1057, 1060 (5th Cir. 1981) (in absence of a definite employment term, seaman's employment is terminable at

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[77] Although listed as a witness in the pretrial order, plaintiffs did not call him at trial. The court apparently received Mr. Lafferty's deposition in its entirety.

will by either party). Obviously, merchant seamen's employment is from vessel to vessel and from contract to contract, rather than continuous. Plaintiffs introduced no evidence to support the notion that their employment differed from this pattern.

EXCERPTS FROM PLAINTIFFS/APPELLEES' ORIGINAL BRIEF ON MERITS (BLACKLISTING)

Pages 64, line 3, through 68, line 11; pages 72, line 7, through 74, line 15

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III.
THE SEAMEN PLAINTIFFS WERE VICTIMS OF MARITIME TORTS AND ENTITLED TO COMPENSATORY AND PUNITIVE DAMAGES

The Defendants complain bitterly about the trial judge's finding that their "intentional, fraudulent, and bad faith conduct" was tortious entitling Plaintiffs to both compensatory and punitive damages. The Defendants further complain that the trial judge did not identify the tort leading to the award of compensatory and punitive damages and that they were only vague references by the district judge to Plaintiffs being vulnerable and subject to intimidation and coercion. The record does not support Defendants' arguments or contentions. The trial court expressly held:

> "The seamen were in a very vulnerable position and were easily intimidated [FF No. 13]."
>
> The court finds that the conduct by the defendants at all times relevant herein was intentional, deliberate, reckless, callous, flagrant, malicious, indifferent, and unconscionable. That such conduct by the defendants was to intimidate, coerce, and punish the plaintiffs. Such conduct was in complete disregard of plaintiffs' rights. That defendants' conduct at all times relevant herein, violates the laws of the public policy of the United States." [FF No. 31]

The court further found that the making of the notations in the Seamen's Books made them unemployable and was for:

> "Such conduct of the defendants was for retaliation and punishment of the plaintiffs for requesting what they were lawfully entitled to, their wages. Defendants' conduct at all times relevant herein, caused plaintiffs duress, emotional duress, and prevented them from being employable as seamen." [CL No. 7]

The entire record of this matter supports the judgment of the district court. It is clear that Plaintiffs are entitled to support their judgment on any basis found in the record. *U.S. v. Aranson*, 696 F.2d 654 (9th Cir. 1983); *U.S. v. Humboldt County, Cal.*, 628 F.2d 549 (9th Cir. 1980). The tortious conduct was Defendants' intimidation, coercion, and duress each and every month Plaintiffs were on board the vessel. The tortious conduct was the intentional and deliberate violation of both the civil and criminal laws of the United States and the State of Washington. The tortious conduct was the intentional infliction of emotional distress and the intentional blacklisting of Plaintiffs prohibiting them from obtaining future employment. The tortious conduct was the Defendants' intentional breach of their covenant and duty of good faith and fair dealing with their employees and a complete breach of their special relationship and fiduciary relationship with Plaintiffs. The Defendants' statement that the Defendants conduct was not "so extreme as to go beyond the bounds of civilized decency" only tells us about the Defendants' value system of believing it to be legally and morally permissible to intentionally underpay its employees, require the execution of double books, and terminate and blacklist any employee who refused to comply. It is

respectfully submitted that if Defendants' double bookkeeping scheme, enforced by intimidation, duress, and coercion, and then blacklisting, does not go beyond the "bounds of civilized decency," little does. The record supports the award of both compensatory and punitive damages for Defendants' tortious conduct, which has been held to constitute "torts" under both the general maritime law and the common law.

Blacklisting is a tort, whether a maritime tort under the court's admiralty jurisdiction or a tort under state law. In *Pino v. Protection Maritime Ins. Co.*, 559 F.2d 10 (1st Cir. 1979), compensatory and punitive damages were allowed. Retaliatory action against employees has likewise been recognized as a tort, both on land and at sea. In *Smith v. Atlas Off-shore Boat Services, Inc.*, 653 F.2d 1057 (5th Cir. 1981), Judge Rubin allowed compensatory damages for the discharge of a seaman for having brought a Jones Act suit. In *Skirpan v. United Airlines*, 1988 WL 87039 (N.D. Ill.), the court awarded over $165,000 for compensatory damages and $750,000 punitive damages for Mr. Skirpan's discharge as a result of his bringing a workman's compensation suit. The Defendants blacklisted Plaintiffs with the specific intent of punishing them in retaliation for enforcing the rights granted them by Congress. Plaintiffs' blacklisting and retaliation claims are based on Defendants' wrongful interference with their future employment as seamen aboard oceangoing vessels, i.e., with maritime contracts. *Kamara v. S. Livanos & Co.*, 90 F. Supp. 435 (S.D.N.Y. 1952); *Pino v. Protection Maritime Insurance Co., Ltd.*, 454 F. Supp. 210 (D. Mass. 1976), aff'd. 599 F.2d 10 (1st Cir. 1979), cert. denied, 444 U.S. 900 (1979). Also, Plaintiffs' claim is derived from and is in furtherance of the federal maritime policy. Specifically, Defendants' retaliation

against the Plaintiffs for asserting claims to wages and penalties under 46 U.S.C. 10313 conflicts with the clear remedial purposes of that statute. The discharge of a seaman for enforcing his rights, even without interference with future employability and blacklisting is a tort under the general maritime law because of the shipowner's economic sanctions in retaliation for the plaintiff "seeking to recover what is due him or to intimidate the seaman from seeking legal redress." *Smith v. Atlas Off-Shore Boat Service, Inc., supra.* Accord: *Roberson v. Rebstock Drilling Co.,* Inc., 749 F.2d 1182, 1184 (5th Cir. 1985); *Merchant v. American S.S. Co.,* 860 F.2d 204, 209 (6th Cir. 1988).

It is undisputed that when the thirteen original Plaintiffs signed off the M/V Pine Forest on February 8, Captain Hayashi entered in each of their Seaman's Books as the reason for their discharge the notation "Requested Repatriation Upon Filing Wage Claim to Arrest Vessel." While Defendants argue that the entry was simply a benign, truthful statement of the reason for the termination of the seafarers' service on the M/V Pine Forest, the evidence establishes that the entry was placed in the seamen's books in retaliation for their having filed their wage claim and has had and will continue to have the intended result of preventing these seamen from gaining future employment in the maritime industry. Captain Hayashi told the Plaintiffs that they would never work again having brought the suit. The notations made in the seamen's books occurred two weeks after the notations in the seamen's book on the Fir Grove which clearly displayed the shipowner's true intent: "disable for future employment". The entry of the notations in the original 13 Plaintiffs' Seaman's Books were not required by law of the United States nor the Republic of Vanuatu, the

country of the vessel's flag. None of the Plaintiffs had remarks of that nature inserted in their Seaman's Books when they were discharged from previous vessels. The reference to Plaintiffs' bringing this action to enforce their wage claims effectively branded them as "trouble makers" in the eyes of Philippine manning agents, thereby rendering them virtually unemployable. The expert testimony of Lafferty that this entry effectively blacklisted these seamen was confirmed by the experience of the seafarers when they sought employment by two manning agencies but were denied employment when their seamen's books were examined. If further support were needed, it was provided, albeit grudgingly, by Defendants' witness, Captain Osena, director of FAME, who testified that he would be reluctant to hire seamen with such notations in their books for fear of jeopardizing his business.

Indeed, each seaman has testified that he was afraid to claim the wages contained in his shipping articles for fear that he would be subjected to reprisals for doing so. It is clear that the seamen's fears were well-founded. Not only was it apparently common knowledge, based on the known experience of other seafarers who had the temerity to make such claims, that such wage claims would be met with hostility and reprisals, but the Defendants in this case both implicitly and explicitly threatened the seamen with discharge and blacklisting if they filed a wage claim.

Damages have always been awarded under the general maritime law for intentional wrongful conduct by a defendant:

> "As under the common law of torts, a person may be liable under the general maritime law for intentional wrongs, such as conversion, . . ." Schoen-

baum, *Admiralty and Maritime Law* (1987), §4.7 "Intentional Wrongs."

In *The Lydia,* 1 F.2d 18 (2d Cir. 1924), the court expressly held that conversion was a maritime tort, stating:

> "The reason for the exercise of admiralty jurisdiction is that conversion is a tort, and a tort so elementary in its nature that it may be maintained even against an infant . . . , and if that tort is committed on navigable waters, admiralty has jurisdiction."

* * * *

Furthermore, the Defendants committed the tort of breach of their duty or covenant of good faith and fair dealing through their use of economic duress, threats, and coercion. The conduct of the Defendants in this case clearly violates the implied covenant, and justifies the imposition of tort remedies including punitive damages to vindicate the compelling societal interest in insuring the payment to employees their just wages. In *Tibbs v. Great American Insurance Co.,* 755 F.2d 1370 (9th Cir. 1985), the court affirmed a compensatory award of $200,000 and a punitive damage award of $600,000 for the insurance company's breach of its implied covenant of good faith and fair dealing in failing to perform its duty of defending the plaintiff in a separate trial in which the defendant was forced to appear in propria persona which resulted in a judgment in plaintiff's favor. This Court, in affirming the lower court, found that there was sufficient evidence to support a finding that the insurer had been guilty of "bad faith and is guilty of oppression, fraud, or malice."

The compensatory damages for loss of future income were computed in accordance with the strict guidelines mandated by the Ninth Circuit. The award of compensatory damages for emotional distress is supported by the record of this proceeding and the eleven months that Plaintiffs endured the intimidation, coercion, and duress of the shipowner, and further by their continuing endurance of unemployment because of the Defendants' blacklisting.

The punitive damages awarded by the district court are a finding of fact just as the award for compensatory damages and are supported by the record of this proceeding. In *Protectus Alpha Navigation v. N. Pacific Grain Growers*, 767 F.2d 1379 (9th Cir. 1985), this Circuit affirmed a punitive damage award of $500,000 based upon the grossly negligent acts of the defendant's employee and noted that punitive damages "serve the purpose of 'punishing defendant of teaching him not to do it again, and of deterring others from following his example.' " This Circuit cited with approval the standard enunciated in *Smith v. Wade*, 103 S.Ct. 1625 (1983), in which the United States Supreme Court stated:

> "We are content to adopt the policy of the common law that reckless or callous disregard for the plaintiff's rights, as well as intentional violation of federal law, should be sufficient to trigger a jury's consideration of the appropriateness of punitive damages."

In the case before this Court, the Defendants exceeded this standard of reckless or callous disregard of Plaintiffs' rights and further clearly deliberately and intentionally violated the federal laws. In *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987), Judge Wright cited *Protectus Alpha Navigation, supra*, with approval and observed that

the purposes of punitive damages "support their availability in general maritime law and the trend is to allow such recoveries". Punitive damages have been allowed by the First Circuit where the Defendants tortiously interfered with the Plaintiffs' future employment. See *Pino v. Protection Maritime Insurance Company, Ltd., supra.* See also, "Punitive Damages in Admiralty," Waddell, *Journal of Maritime Law and Commerce,* Volume 19, No. 1, January, 1988.

Punitive Damages for Defendants' abusive treatment of their seafarers and outrageous breach of their contractual rights does not duplicate this Court's award for penalty wages. *Buckley v. Oceanic S.S. Co.*, 5 F.2d 545 (9th Cir. 1925); *Gerber v. Spencer, supra.* The imposition of the penalty wages results from Defendants' violation of the penalty wage statute and not the general maritime law of the United States. The imposition of punitive damages results from the Defendants' commission of separate maritime torts claimed as separate causes of action under the general maritime law. Plaintiffs have asserted separate causes of action in tort under the general maritime law. The compensatory and punitive damages sought under those claims are separate and apart from the statutory relief claimed under the United States Shipping Code.

As noted above, Defendants entered the phrase "Requested Repatriation Upon Filing Wage Claim to Arrest Vessel" in the Plaintiffs' seamen's books with the intended and naturally foreseeable result of blacklisting them among all manning agents in the Philippines, thereby effectively depriving them of their livelihood as seafarers. In view of the severe damage inflicted upon Plaintiffs by Defendants' deliberate and vindictive misconduct, and the predictable, chilling effect that conduct

will have on the willingness of present and future crews on Delica's Inui-managed and Western-manned vessels to seek to vindicate their rights, punitive damages are necessary both to deter future such misconduct and to reassure those seamen that their right to seek redress against their masters under American laws will be protected.[22]

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[22]The instant case is distinguishable from *Smith v. Atlas Off-Shore Boat Service, Inc., supra*, where the Fifth Circuit declined to asses punitive damages for an unlawful retaliatory discharge. Unlike here, that case involved the retaliatory discharge of a single seaman for filing a claim for personal injuries under the Jones Act, and the discharge was not accompanied by blacklisting or other vindictive attempts to affect the seaman's future employment prospects.

EXCERPTS FROM REPLY BRIEF OF APPELLANTS (BLACKLISTING)

Pages 9, line 17, through 10, line 17

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V.

THE ADDITIONAL TORTS CLAIMED BY MR. DODSON ON APPEAL ARE SUPPORTED NEITHER BY THE FINDINGS NOR THE EVIDENCE

In his Findings of Fact and Conclusions of Law Judge Tanner ruled that the plaintiffs were entitled to a tort recovery, but he did not identify the tort. Mr. Dodson argues that the evidence at trial supported a judgment for the plaintiffs for blacklisting and for fraud. Perhaps uncertain about this conclusion, he then lists ten more tort theories that he argues are established by the evidence and support the judgment. Of these, only the outrage theory was pleaded in the complaints or identified in the pretrial order.[9]

Throughout these coordinated cases Mr. Dodson has indiscriminately scattered strings of irrelevant cases and doctrines in his wake and then left opposing counsel to

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[9]The torts are the following: 1) "intimidation, coercion, and duress . . ." Dodson Br. p. 65; 2) "intentional . . . violation of . . . civil and criminal laws of the United States and the State of Washington . . ." p. 65; 3) "intentional infliction of emotional distress . . ." p. 65, p. 68; 4) "intentional breach of their covenant and duty of good faith . . ." p. 65; 5) "breach of their special relationship and fiduciary relationship with Plaintiffs." p. 65; 6) "retaliatory action against employees . . ." p. 65; 7) "wrongful interference with . . . future employment as seamen . . ." p. 66; 8) "outrage" p. 69; 9) "wrongful termination of employment in violation of public policy" p. 70; and 10) "constructive fraud" p. 70.

follow after and clean up the resulting mess. Defendants decline to do so here. It would be possible to review the necessary elements of all of the new torts he invokes and show why each is inapplicable, but it is not a practical use of the space allowed or the Court's time. In summary, these torts can be sorted into three groups: one based on enlisting the seamen in the ITF program, the second on terminating the seamen's employment, and the third on the entries in the Seamen's Books.

As to the first group, no matter what torts Mr. Dodson claims occurred, the knowing, willing participation of the seamen precludes a tort. As to the second group, it was the seamen, not the defendants, who ended the employment relationship. Finally, whatever torts Mr. Dodson thinks the notations constitute, the statements in the books are truthful and privileged and also cannot be considered tortious for other doctrinal reasons discussed in defendants' opening brief at pp. 71-72. Plaintiffs' briefs do not even respond to the argument that the notations are privileged.

II.

EXCERPTS RE *BACK WAGES* FROM PARTIES' BRIEFING ON APPEAL IN THE NINTH CIRCUIT

[Editor's note: Typographical errors, especially the numerous ones in Petitioner's Briefing below, have not been corrected.]

EXCERPTS FROM BRIEF OF APPELLANTS (BACK WAGES)

Pages 12, line 21, through 14, line 24; pages 53, line 15, through 58, line 10; Addendum No. 3, pages 1-8

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P. Defendants Pay the Back Wages Demanded by the Thirteen Individual Plaintiffs

Plaintiffs' first complaint sought back wages as of January 24, 1990, for the eleven plaintiffs in amounts totaling $203,735.74, but the total in the complaint was $231,198.58 because of an error in addition, DN 1, ¶9, pp. 4-5. Nevertheless, on February 8, 1990, defendants tendered $231,198.58 to the plaintiffs. Hrg. Tr. (2/8/90) 26, 32:6-8, 35:12-14, 18:20-24, 19:1-5, *See Id.* 15 ("We have paid your honor, it's like a gun to somebody's head."). Mr. Dodson rejected the tender that day, because he had filed or was about to file the first amended complaint adding two individual and six AMOSUP Plaintiffs, and increasing the claims. *Id.* 26-27, 31-33. Mr. Dodson stated, "We have to respectfully decline a partial tender." *Id.* 27:17.

The first amended complaint claimed back wages due as of February 7, 1990, of $429,580.20. ER 320, DN 16, p. 4, ¶9; Tr. Ex. 23. Of this amount, between $265,000 and $270,000 was the total, as of February 7, of the back wages claimed for the thirteen individuals. ER 320, *Id.*, Ex. A. This was not broken out from the damages claimed for the entire crew.[27] *Id.*

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[27] Although Silverio and Cabibihan had not yet been added to the action in the first amended complaint, Exhibit A contains [footnote continued]

The second amended complaint, which was filed as part of a motion for leave to amend on February 13, 1990, and added the last two AMOSUP Plaintiffs (Silverio and Cabibihan), continued to demand $429,580.20 as the back wages due on February 7, 1990. DN 29, 56, p. 5, ¶9, Ex. A. The amounts claimed for the thirteen individual plaintiffs also remained the same. *Id.*, Ex. A. See footnote 69 *infra* for the detail of all wage claims in the complaints.

On February 13, 1990, the filing date of the motion to file a second amended complaint, defendants tendered $267,585.65 to plaintiffs on their counsel's representation that these were the back wages due the thirteen individual plaintiffs. ER 842-843, Addendum No. 2, p. 2-3;[28] DN 195, FF 20, p. lines 17-18 only.[29] Plaintiffs accepted this tender. DN 195, pp. 7:4, 17:11-12.

On May 8, 1990, in Baton Rouge, Louisiana, Mr. Dodson's damages expert G. Randolph Rice testified in his deposition that the $267,585.65 paid by defendants was $15,610 more than was actually due. Tr. Ex. 28, Rice 4, 5, Ex. 3 (introduced as Tr. Ex. 6A at trial). Mr. Dodson, on the record, confirmed this ("In other words, we were overpaid slightly . . ."). *Id.* 5:25, 6:1-4, Ex. 3.

At trial, the individual plaintiffs made no claim for earned back wages. DN 176/177, PTO pp. 9-13. Dr. Rice testified again that they had been overpaid, Tr.

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damage claims for them as well as for the other six AMOSUP Plaintiffs.

[28] See Part III, Argument, *infra*, for the reasons requiring Mr. Stacey's cited Declaration.

[29] Defendants accept only the lines specifically cited in Finding of Fact 20. Most of the remainder of that Finding is clear error and contrary even to plaintiffs' evidence, as will be discussed.

92-93, Tr. Ex. 6A, basing his calculation on Mr. Dodson's data. Tr. 93-94. At one point, defendants' counsel reminded the court that the individual plaintiffs' claimed wages had been paid, AMOSUP's counsel said that the AMOSUP Plaintiffs had not been fully paid and Mr. Dodson said nothing. Tr. 262-265. Mr. Dodson closed for all plaintiffs, claiming "penal wages for all twenty-one of the plaintiffs," but back wages only for "the AMOSUP eight, because they have never been paid their back wages under the shipping articles." Tr. 374.[30]

Judge Tanner orally found for plaintiffs and directed them to prepare Findings of Fact and Conclusions of Law. Tr. 373. On June 27, 1990, thirty-five days after trial, plaintiffs filed Proposed Findings of Fact and Conclusions of Law. DN 188. These included a proposed finding that the individual plaintiffs were still due earned back wages of $7,206.02. *Id.* at p. 14-15:26, fn. 24; ER 831-832. This amount allegedly represented wages covering January 24, 1990, to February 8, 1990, which allegedly were not included in the $267,585.60 paid plaintiffs. *Id.* The alleged shortfall, plaintiffs contended, meant that statutory penalties had continued to accrue after February, 1990.

At a July 13, 1990, hearing on the Findings and Conclusions, Mr. Dodson again stated that back wages were still due the thirteen individual plaintiffs. Hrg. Tr. (7/13/90) 16-18. Defendants' counsel objected, reminding the court that Dr. Rice had testified that plaintiffs had been overpaid $15,610 as of February 16, 1990. *Id.* at 22-23. Judge Tanner then responded that all back

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[30]The AMOSUP Plaintiffs had been paid the difference between AMOSUP and POEA wages. Tr. 356, 374:18-20, Tr. Ex. 41, p. 14.

wages had not been paid because the "$267,585 did not include penalty wages." *Id.* at 23:13-25. He subsequently found in his Findings and Conclusions that:

> 20. On February 13, 1990, the total sum of $267,585.65 was tendered by defendants to the original thirteen plaintiffs for wages claimed through January 24, 1990, but the tender did not include penalty wages. The amount tendered did not include $15,019.20 in wages earned by the seamen between January 24th and February 8th, the date of final discharge which amount was claimed in plaintiffs' amended complaints for back wages. . . . Defendants have failed to show sufficient cause for withholding payment of penalty wages once back due wages were paid in February of 1990.

DN 195.[31]

* * * *

2. The Amount Tendered Was In Fact An Overpayment

Since Dr. Rice's testimony that the $267,585 was an overpayment was the only evidence at trial on the subject – and it was plaintiffs' evidence – Judge Tanner's Finding No. 20 that it did not include wages earned between January 24, 1990, and February 8, 1990, was clearly erroneous. The claim after trial that there had been a mathematical mistake was not evidence and was too late, because made after the record closed.

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[31] Although Judge Tanner found that $15,019.20 in back wages was still due the thirteen individual plaintiffs, later in the Findings he awarded $23,696.09. DN 195, FF 33, pp. 9-10. This discrepancy between the back wages found due the thirteen plaintiffs in Finding No. 20 and the back wages in Finding No. 33 was first discovered in preparing this brief. The back wages for each of the thirteen individual plaintiffs were not totaled in the Findings.

In addition, Mr. Dodson's new arithmetic was wrong.[58] Even accepting the figures on which he based his new calculations, the $267,585 exceeded the back wages due through February 8, 1990.

After the trial, Mr. Dodson filed Proposed Findings of Fact and Conclusions of Law on June 27, 1990, and Amended Proposed Findings of Fact and Conclusions of Law with a motion to amend his original proposed findings on July 12, 1990. ER 831-832, 834-835, DN 188, pp. 14-15, DN 190, pp. 14-15 In paragraph 24 of his first set of Proposed Findings, Mr. Dodson claims for the first time that the $267,585.65 is less than the full wages claimed, supporting this with a chart in footnote 24. With the exception of the figures under the heading "Monthly Wages" under the shipping articles and "Wages Paid", the figures in the chart appear incorrect.[59] But it is the "Monthly Wages" column on which the Court should focus. Defendants accept these figures with an insignificant caveat.[60]

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[58]The correct calculations, giving plaintiffs the benefit of every reasonable assumption, and the proper method of determining wages under the ITF model agreement which Judge Tanner held to be applicable, are set forth in Addendum No. 3 and show that the amount actually due on plaintiffs' theory was less than the amount paid. These calculations are the only ones supported by the evidence in this case and thus Judge Tanner's contrary conclusion is clearly erroneous.

[59]Defendants do not know if the figures under the heading "Payments Made After Arrest" are correct, because these represent Mr. Dodson's allocation of portions of the $267,585 to his clients. Defendants paid him a lump sum. He apparently paid some seamen more and some less than what they were entitled to, if ITF wages were due. *See* Tr. Ex. 6A.

[60]They are identical to defendants' corresponding figures in Addendum No. 3, except they omit the fact that Alvarado for

[footnote continued]

These figures purportedly represent the amount each seaman was entitled to each month. If the figures are accepted, multiplied by the number of months worked and then reduced by the amount the seaman was actually paid each month, the calculation yields total back wages due. The formula would be "Back Wages Due" (BW) equals "Monthly ITF Wages" (W) times "Months Worked" (M) minus "Amount Actually Paid" (P): BW = (W x M) – P.

The number of months worked is disputed, although the record is clear. The seamen joined the vessel on March 19, 1989. Tr. Exs. 4, 8. Plaintiffs introduced no evidence to the contrary at trial. Dr. Rice, who received his information from Mr. Dodson, calculated back wages on the assumption that the seamen began work on March 19, 1989, and testified to that effect. Tr. 92-94, Tr. Ex. 6A. Judge Tanner found that the seamen joined the vessel on March 27, 1990, the date on the signature page of the shipping articles. DN 195, FF 6, Tr. Ex. 1. For purposes of argument, however, defendants accept Mr. Dodson's contention that March 9, 1989, was the commencement date for the thirteen individual plaintiffs other than Raby.[61] Defendants also accept his contention that their employment ended on February 8, 1989.[62] On this

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most of his time on the vessel would have received $3,375.60, not $4,193.20, if ITF wages applied. See discussion below. The fact is reflected in plaintiffs' chart in the "Total Due" column which has a figure for Alvarado that could not be the product of $4,-193.20 for the ten to eleven months he worked on the vessel.

[61] Mr. Dodson apparently takes the position that the seamen began work on the day they signed the POEA contracts, March 9, 1989. This is not evidence of when they actually began work, which is the only relevant date under the shipping articles he says are controlling. *See* Tr. Ex. 1, p. 1.

[62] Arguably, their employment and wages ended when plaintiffs arrested the vessel, and the statute no longer applied. *Putnam v. Lower*, 236 F.2d 561, 570 (9th Cir. 1956).

assumption, all of the seamen, other than Raby, worked on the vessel for eleven months. Raby worked on the vessel from September 2, 1989, to February 8, 1990, or five months and seven days, i.e., 5.233 months.

Alvarado's pay changed on January 6, 1990, when he was promoted to chief officer after Cabibihan left the vessel. Alvarado's monthly ITF income from January 6, 1989, to February 8, 1990, was $4,193.20, as set forth in Mr. Dodson's chart, which is also the figure calculated by Dr. Rice and presented in Trial Exhibit 6A. His earlier monthly ITF wage was $3,375.60. *See* Addendum No. 3, Tr. Exs. 1, 6 (May 7, 1990, letter from Dr. Rice to Mr. Dodson), 9, Annex 1.[63] For ease of calculation and in order to give plaintiffs every benefit of the doubt, we assume that Alvarado was promoted on January 1, 1990, and that he had a monthly wage of $3,375.60 from March 9, 1989, to January 1, 1990, or for nine months and twenty-two days (9.733 months), and a monthly wage of $4,193.20 from January 1, 1990, to February 8, 1990 (1.2667 months).

Defendants will also accept Mr. Dodson's calculation of the total amount actually paid to plaintiffs during the eleven months: $67,133.60.

The Court can now see the wages that actually would have been due the thirteen individual plaintiffs using Mr. Dodson's own figures for monthly ITF wages:

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[63]Mr. Dodson does not set forth Alvarado's earlier ITF pay, but it is clear from the articles and the annex to the ITF world-wide agreement that it was $3,375.60. Tr. Exs. 1, 9, Annex 1. This was the same pay as Torreliza and Roz received; they all were listed on the articles' sign-on sheet as having the same base pay of $1430 under the ITF scale and the calculation of additional pay under the ITF model agreement is based completely on the base pay. *Ibid.*

	Monthly Wage	x	*Months Worked*		*Total ITF Wages*
Raby	$4,193.20	x	5.2334	=	$21,944.69
Torreliza	$3,375.60	x	11	=	$37,131.60
Ajero	$3,254.40	x	11	=	$35,798.40
Banogan	$1,477.40	x	11	=	$16,251.40
Cabales	$1,970.60	x	11	=	$21,676.60
Roz	$3,375.60	x	11	=	$37,131.60
Rabie	$1,970.60	x	11	=	$21,676.60
Berido	$1,970.60	x	11	=	$21,676.60
Suarez	$1,970.60	x	11	=	$21,676.60
Marquez	$1,477.40	x	11	=	$16,251.40
Bonnit	$1,477.40	x	11	=	$16,251.40
Laxina	$1,477.40	x	11	=	$16,251.40
Alvarado (as 2d officer)	$3,375.60	x	9.7333	=	$32,855.73
(as 1st officer)	$4,193.20	x	1.2667	=	$ 5,311.53
Total ITF Wages Earned					$321,885.55

Total ITF wages earned through February 8, 1990, are thus $321,885.55. From that amount total pay actually received by the thirteen plaintiffs – $67,133.60, according to plaintiffs – is subtracted. The back wages due as of February 8 would then be $254,751.95.

$321,885.55
- 67,133.60
$254,751.95

When the $254,751.95 actually due using plaintiffs' premises is subtracted from the $267,585.65 paid by defendants, the result is an overpayment of $12,833.70.

$267,585.65
– 254,751.95
$ 12,833.70

This is not the figure yielded by Mr. Dodson's calculations because he apparently used the wrong factors and counted some wages twice. An extended proof of his errors is unnecessary because enough are obvious. Note the headings in the chart in footnote 24 of the First Proposed Findings. ER 831-832. Column 2 represents the total wages due for the time the seamen were on board as $326,906.07. See "Subtotal" on p. 15. ER 832. That should be the entire amount due, because the seamen were on board until February 8, 1990. But the next to the last column adds more wages, for the period 1/25/90 to 2/8/90, which total $15,019.20, thus double counting two weeks of the ITF wages.

The errors in Mr. Dodson's calculations are also revealed by dividing the total ITF wages (column 2) by the monthly ITF wage (column 1). This yields the number of months by which he multiplied the monthly wage.[64] That number turns out to be 11.133. In other words, Mr. Dodson's calculation assumes that the men were on board the vessel eleven months and four days. Of course, this is incorrect because March 9, 1989, to February 8, 1990, is not eleven months, four days, but only eleven months. But then he compounds the error by adding wages for two more weeks – purportedly to cover 1/24/90 - 2/8/90 – to this total, thus giving them wages for eleven months and *eighteen* days.

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[64] This calculation cannot be performed on Alvarado's figures, because they represent a hybrid of two different monthly wages.

In his Amended Proposed Findings of Fact, Mr. Dodson's chart is in footnote 25 on p. 14. ER 834-835. Here he changes the headings so that the figures in the second column under "Total Due For Time On Board" now supposedly represent only wages earned during the period ending 1/24/90. But the figures in the column remain the same, as do the figures in column one, "Monthly Wages." This means that he is still multiplying the monthly wages by 11.133, i.e., on the assumption of eleven months and four days. But the period from March 9, 1989, to January 24, 1990, is not eleven months and four days. It is ten months and sixteen days.

3. Judge Tanner's Findings Were Not Supported By Evidence, Were Internally Inconsistent, and Were Even Contradicted by Plaintiffs' Own Calculations

Finding of Fact No. 20 states:

> 20. On February 13, 1990, the total sum of $267,585.65 was tendered by defendants to the original 13 plaintiffs for wages claimed through January 24, 1990, but the tender did not include penalty wages. The amount tendered did not include $15,019.20 in wages earned by the seamen between January 24th and February 8th, the date of final discharge which amount was claimed in plaintiffs' amended complaints for back wages. Payments were made without admission of liability and with reservations of right to collect same if court found in favor of defendants. Penalty wages are included in the definition of wages. Defendants have failed to show sufficient cause for withholding payment of penalty wages once back due wages were paid in February of 1990.

The preceding section shows the clear error in Judge Tanner's Finding that the February 13, 1990, tender did not include $15,019.20 allegedly earned between January 24 and February 8. Even Mr. Dodson agreed that the Finding was wrong. He claimed $7,206.00 still owed, not $15,019.20. See footnote 24 to his Proposed Findings and footnote 25 to his Amended Proposed Findings. ER 831-832, 834-835 (see "Subtotal" under "Balance Due"). See also ER 867, Hrg. Tr. (1/28/91) 13.[65]

Judge Tanner's Finding on this issue in Finding of Fact No. 20 is contradicted later in Finding of Fact No. 33, in which he awards plaintiffs not $15,019.20 in remaining back pay, but a total of $23,696.09. Defendants are at a loss as to the derivation of this number.

Another puzzling and apparently self-contradictory aspect of the Findings is reflected in Judge Tanner's allowance to defendants of a set-off of $267,585.65 – the amount of the tender – against the total damages. DN 195, CL 9. This is far in excess of the total back wages awarded of $165,932.13. In other words, the $267,585.65 tender more than covers the back wages awarded to the plaintiffs and amounts to a ruling that they have been paid. This may or may not be what Judge Tanner intended, but whatever he intended, the Findings on back wages are not only unsupported by evidence, they are internally inconsistent – indeed, incoherent.

Perhaps nothing better illustrates this than the final sentence of Finding of Fact No. 20, which states, "Defendants have failed to show sufficient cause for withholding payment of *penalty* wages once back due

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[65]Mr. Dodson did not claim the full $15,019.20 which he claimed for the period 1/25/90 - 2/8/90, because he acknowledged that he had earlier claimed too much for seaman Alvarado. ER 832, n.24 (Alvarado entry, last column).

wages were paid in February of 1990." Here the unmistakable implication is that all back wages due were paid in February, 1990, which was probably what Judge Tanner had intended to find before he saw plaintiffs' Proposed Findings. See his remarks at trial. Tr. 261-265.[66]

* * * *

ADDENDUM NO. 3

CALCULATION OF BACK WAGES UNDER THE MODEL ITF WORLD-WIDE COLLECTIVE AGREEMENT

Introduction

Judge Tanner found that the rate stated in the signature page of the shipping articles was the rate to which the plaintiffs were entitled. He also found that the shipping articles incorporated the model ITF world-wide collective agreement, rather than the ITF collective agreement signed with JSU/AMOSUP. Tr. Exs. 9, 3. Although defendants vigorously challenge both of these findings, this Addendum assumes they are correct and attempts to provide the court with a clear description of

(a) the proper method for calculating wages under the model ITF world-wide agreement; and

(b) the actual calculation of back wages due the thirteen individual plaintiffs on the assumption that the agreement applies.

There are four calculations because the dates that the men worked are disputed by the parties. Although Mr.

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[66] Plaintiffs also assign as clear error the Finding that the amount of $15,019.20 "was claimed in plaintiffs' amended complaints for back wages." See footnote 44.

Dodson's most recent argument is that the men began work on March 9, 1989, it is unsupported by record evidence and it was not the date used by his expert, Dr. Rice. The date supported by the record and used by Dr. Rice was March 19, 1989, the date the seamen joined the vessel and the date from which their pay actually ran – a date to which no seaman ever objected before the vessel's arrest. See Tr. Ex. 8, 4 (March, 1989 wage receipts).

The date of termination of employment, however, is less clear. This appendix provides four calculations based on four different assumptions – an ending date of January 24, 1990, of January 31, 1990, of February 8, 1990 (Mr. Dodson's selection), and of February 16, 1990.

Whenever possible, necessary assumptions are made in favor of the plaintiffs.

The Elements of the Monthly Wage
Under the ITF World-Wide Agreement

The total monthly pay of a seaman under the model ITF world-wide agreement, Tr. Ex. 9, consists of four elements:

1. *Basic monthly pay* (*Id.* §4, Annex 1)

2. *Overtime* (*Id.* §6, 7(b), Annex 1)

3. *Leave pay* (*Id.* §15, Annex 1)

4. *Subsistence Allowance* (*Id.* §21, Annex 2)

1. *Basic Monthly Pay.* This is taken from the signature page of the Articles and derives from Annex 1 of the model agreement. Tr. Ex. 9, immediately following §27.

2. *Overtime.* There are two overtime rates, both of which are set forth in Annex 1. The first is for weekday overtime. The second is for overtime on Saturdays, Sundays, and Holidays ("Saturday Overtime").

Because records on the Pine Forest were not kept in accord with the model agreement, overtime for each seaman is conclusively presumed to be 40 hours of weekday overtime and 64 hours of Saturday Overtime each month. *Id.* §7(b).

3. *Leave Pay.* The model agreement provides that each seaman receives four days of leave pay per month. *Id.* §15. The daily pay for each position is set forth in Annex 1. Monthly leave pay is thus four (4) multiplied by the daily rate in Annex 1.

4. *Subsistence Allowance.* Each seaman receives the same subsistence allowance of $17.60 per day under the model agreement. *Id.*, Annex 2. Since this is an allowance for subsistence during paid leave, *Id.* §2, to determine *monthly* subsistence due, the daily allowance is multiplied by four (4) – the number of days of paid leave provided. See generally Tr. Ex. 6. In this case, each seaman receives $70.40 per month.

Illustrations of Calculation

Two illustrations are provided: the first for seaman Roz who worked at the same rank from the day he joined the vessel to the day he left on February 8, 1990; the second for seaman Alvarado who worked as second officer from the day he joined the vessel until January 6, 1990 and then served as chief officer at higher pay until February 8, 1990.

Illustration 1. Teofanis F. Roz – Second Assistant Engineer

The Articles specify Mr. Roz's wage as $1,430. This is listed as the base pay. Because overtime hours were not recorded per the ITF agreement, Mr. Roz is paid for 40 hours of weekday overtime and 64 hours of Saturday Overtime, at $10.60 per hour of weekday overtime and $19.10 per hour of Saturday Overtime. This is $424 for weekday and $1,222.40 for Saturday Overtime.

He is also paid for four days of vacation per month. Under the ITF Agreement, Annex 1, Mr. Roz's daily leave pay is $57.20. This daily wage is then multiplied by four and yields $228.80, the monthly leave pay.

Finally, Mr. Roz would receive a subsistence payment of $17.60 for each day of paid leave. Four times $17.60 equals $70.40.

Adding together the base pay, weekday overtime, Saturday Overtime, paid leave, and subsistence equals the total monthly salary per the ITF agreement of $3,375.60.

Base pay	$1,430.00
Overtime (W)	424.00
Overtime (S)	1,222.40
Leave pay	228.80
Subsistence	70.40
	$3,375.60

Illustration 2. Camilo A. Alvarado

A. Monthly Model ITF Wage as Second Officer

Second officer's base pay is the same as second assistant engineer. Tr. Ex. 9, Annex 1; Tr. Ex. 1. Accordingly, Mr. Alvarado had the same overtime, paid leave and subsistence allowance as Mr. Roz (Annex 1). In other words,

he had the same monthly wage under the model agreement: $3,375.60.

B. Monthly Model ITF Wage as Chief Officer

The base pay of the chief officer is $1,786.

Overtime rate is

$13.20/hr (weekday)
$23.80/hr (Saturday, Sunday, Holiday)

Forty hours weekday overtime is

$13.20 x 40 = $528.00

Sixty-four hours Saturday Overtime is

$23.80 x 64 = $1,523.20

Total monthly overtime is

$528.00 + $1,523.20 = $2,051.20

Leave pay for chief officer

Daily rate:	$ 71.40
times four days	x 4
	$285.60

Subsistence = $70.40/month.

Alvarado's monthly pay as chief officer is thus

Base pay	$1,786.00
Overtime	2,051.20
Leave pay	285.60
Subsistence	70.40
	$4,193.20

The monthly wages under the ITF world-wide agreement for each of the thirteen seamen is set forth in Chart A below.

CHART A – CALCULATION OF MONTHLY WAGE UNDER MODEL ITF WORLD-WIDE AGREEMENT FOR EACH OF THE 13 INDIVIDUAL PLAINTIFFS

PLAINTIFFS	BASE PAY (1)	REGULAR OVERTIME (2)	SPECIAL OVERTIME (3)	PAID LEAVE (4)	SUBSIS-TENCE (5)	TOTAL MONTHLY
C. Alvarado*	$1,430.00	$424.00	$1,222.40	$228.80	$70.40	$3,375.60
C. Alvarado**	$1,786.00	$528.00	$1,523.20	$285.60	$70.40	$4,193.20
N. Raby	$1,786.00	$528.00	$1,523.20	$285.60	$70.40	$4,193.20
T. Roz	$1,430.00	$424.00	$1,222.40	$228.80	$70.40	$3,375.60
A. Torreliza	$1,430.00	$424.00	$1,222.40	$228.80	$70.40	$3,375.60
C. Ajero	$1,378.00	$408.00	$1,177.60	$220.40	$70.40	$3,254.40
T. Rabie	$821.00	$244.00	$704.00	$131.20	$70.40	$1,970.60
M. Berido	$821.00	$244.00	$704.00	$131.20	$70.40	$1,970.60
M. Suarez	$821.00	$244.00	$704.00	$131.20	$70.40	$1,970.60
M. Cabales	$821.00	$244.00	$704.00	$131.20	$70.40	$1,970.60
T. Marquez	$611.00	$180.00	$518.40	$97.60	$70.40	$1,477.40
L. Bonnit	$611.00	$180.00	$518.40	$97.60	$70.40	$1,477.40
H. Banogon	$611.00	$180.00	$518.40	$97.60	$70.40	$1,477.40
C. Laxina	$611.00	$180.00	$518.40	$97.60	$70.40	$1,477.40

*until January 5

**January 6 to completion of employment

1. Base pay taken from shipping articles.
2. Weekday Overtime calculated as 40 hours of overtime using ITF regular overtime rate.
3. Saturday Overtime calculated as 64 hours of overtime using ITF special overtime rate.
4. Paid leave is based on four days leave per thirty day month.
5. Subsistence Allowance is based on paid leave days at ITF rate.

The total monthly salary for each man is carried down from the chart above to the charts below. Multiplying this number by the total months worked gives the total amount each seaman would have earned under the ITF world-wide agreement. The total months worked was calculated by counting the number of months from March 19, 1989, until January 24, 1990, January 31, 1990, February 8, 1990, and February 16, 1990.

For instance, in the first chart, most men worked from March 19 until January 24. From March 19 until January 18 is ten months. January 19 until January 24 is 6 days. Six days divided by 30 days is 0.2 months. Therefore, the total months is 10.2. Mr. Alvarado worked from March 19, 1989 until January 5, 1990, which is 9.6 months, at $3,375.60 per month. He then worked from January 6 until January 24, 0.63 months, at $4,193.36 per month. Mr. Raby did not join the ship until September 2, 1989, and thus by January 24 had only worked 4.766667 months.

The correct calculations, defendants contend, are set forth in Chart II or Chart III depending how the law is interpreted; Chart II shows an overpayment of $29,425.89; Chart III an overpayment of $21,122.23.

CHART I

MODEL ITF WORLD-WIDE BACK WAGES
(3/19/89 TO 1/24/90)

PLAINTIFFS	TOTAL MONTHLY	MONTHS WORKED UNTIL 1/24	AMOUNT DUE	AMOUNT PAID	PAYMENT RECEIVED	TOTAL DUE
C. Alvarado	$3,375.60	9.6	$32,405.76	$10,974.17	$36,835.85	
C. Alvarado*	$4,193.20	0.63	$2,641.72			($12,762.54)
N. Raby**	$4,193.20	4.766667	$19,987.59	$4,529.29	$17,875.50	($2,417.20)
T. Roz	$3,375.60	10.2	$34,431.12	$8,600.16	$29,000.85	($3,169.89)
A. Torreliza	$3,375.60	10.2	$34,431.12	$6,766.61	$30,769.06	($3,104.55)
C. Ajero	$3,254.40	10.2	$33,194.88	$6,958.18	$29,030.14	($2,793.44)
T. Rabie	$1,970.60	10.2	$20,100.12	$4,073.12	$17,909.93	($1,882.93)
M. Berido	$1,970.60	10.2	$20,100.12	$4,073.12	$17,909.93	($1,882.93)
M. Suarez	$1,970.60	10.2	$20,100.12	$4,073.12	$17,909.93	($1,882.93)
M. Cabales	$1,970.60	10.2	$20,100.12	$3,708.42	$17,909.93	($1,518.23)
T. Marquez	$1,477.40	10.2	$15,069.48	$3,188.05	$13,401.53	($1,520.10)
L. Bonnit	$1,477.40	10.2	$15,069.48	$3,500.65	$13,011.00	($1,442.17)
H. Banogon	$1,477.40	10.2	$15,069.48	$3,188.05	$13,011.00	($1,129.57)
C. Laxina	$1,477.40	10.2	$15,069.48	$3,500.65	$13,011.00	($1,422.17)
			$297,770.58	$67,133.59	$267,585.65	($36,948.66)

*PROMOTED JANUARY 6, 1990
**JOINED VESSEL SEPTEMBER 2, 1989

CHART II

MODEL ITF WORLD-WIDE BACK WAGES
(3/19/89 to 1/31/90)

PLAINTIFFS	TOTAL MONTHLY	MONTHS WORKED UNTIL 1/31	AMOUNT DUE	AMOUNT PAID	PAYMENT RECEIVED	TOTAL DUE
C. Alvarado	$3,375.60	9.6	$32,405.76	$10,974.17	$36,835.85	
C. Alvarado*	$4,193.20	0.866667	$3,634.11			($11,770.15)
N. Raby**	$4,193.20	5	$20,966.00	$4,529.29	$17,875.50	($1,438.79)
T. Roz	$3,375.60	10.433333	$35,218.76	$8,600.16	$29,000.85	($2,382.25)
A. Torreliza	$3,375.60	10.433333	$35,218.76	$6,766.61	$30,769.06	($2,316.91)
C. Ajero	$3,254.40	10.433333	$33,954.24	$6,958.18	$29,030.14	($2,034.08)
T. Rabie	$1,970.60	10.433333	$20,559.93	$4,073.12	$17,909.93	($1,423.12)
M. Berido	$1,970.60	10.433333	$20,559.93	$4,073.12	$17,909.93	($1,423.12)
M. Suarez	$1,970.60	10.433333	$20,559.93	$4,073.12	$17,909.93	($1,423.12)
M. Cabales	$1,970.60	10.433333	$20,559.93	$3,708.42	$17,909.93	($1,058.42)
T. Marquez	$1,477.40	10.433333	$15,414.21	$3,188.05	$13,401.53	($1,175.37)
L. Bonnit	$1,477.40	10.433333	$15,414.21	$3,500.65	$13,011.00	($1,097.44)
H. Banogon	$1,477.40	10.433333	$15,414.21	$3,188.05	$13,011.00	($784.84)
C. Laxina	$1,477.40	10.433333	$15,414.21	$$3,500.65	$13,011.00	($1,097.44)
			$305,294.15	$67,133.59	$267,585.65	($29,425.09)

*PROMOTED JANUARY 6, 1990
**JOINED VESSEL SEPTEMBER 2, 1989

**JOINED VESSEL SEPTEMBER 2, 1989

CHART III

MODEL ITF WORLD-WIDE BACK WAGES
(3/19/89 to 2/8/90)

PLAINTIFFS	TOTAL MONTHLY	MONTHS WORKED UNTIL 2/8	AMOUNT DUE	AMOUNT PAID	PAYMENT RECEIVED	TOTAL DUE
C. Alvarado	$3,375.60	9.6	$32,405.76	$10,974.17	$36,835.85	
C. Alvarado*	$4,193.20	1.1	$4,612.52			($10,791.74)
N. Raby**	$4,193.20	5.233333	$21,944.41	$4,529.29	$17,875.50	($460.38)
T. Roz	$3,375.60	10.7	$36,118.92	$8,600.16	$29,000.85	($1,482.09)
A. Torreliza	$3,375.60	10.7	$36,118.92	$6,766.61	$30,769.06	($1,416.75)
C. Ajero	$3,254.40	10.7	$34,822.08	$6,958.18	$29,030.14	($1,166.24)
T. Rabic	$1,970.60	10.7	$21,085.42	$4,073.12	$17,909.93	($897.63)
M. Berido	$1,970.60	10.7	$21,085.42	$4,073.12	$17,909.93	($897.63)
M. Suarez	$1,970.60	10.7	$21,085.42	$4,073.12	$17,909.93	($897.63)
M. Cabales	$1,970.60	10.7	$21,085.42	$3,708.42	$17,909.93	($532.93)
T. Marquez	$1,477.40	10.7	$15,808.18	$3,188.05	$13,401.53	($781.40)
L. Bonnit	$1,477.40	10.7	$15,808.18	$3,500.65	$13,011.00	($703.47)
H. Banogon	$1,477.40	10.7	$15,808.18	$3,188.05	$13,011.00	($390.87)
C. Laxina	$1,477.40	10.7	$15,808.18	$3,500.65	$13,011.00	($703.47)
			$313,597.01	$67,133.59	$267,585.65	($21,122.23)

*PROMOTED JANUARY 6, 1990
**JOINED VESSEL SEPTEMBER 2, 1989

CHART IV

MODEL ITF WORLD-WIDE BACK WAGES
(3/19/89 to 2/16/90)

PLAINTIFFS	TOTAL MONTHLY	MONTHS WORKED UNTIL 2/16	AMOUNT DUE	AMOUNT PAID	PAYMENT RECEIVED	TOTAL DUE
C. Alvarado	$3,375.60	9.6	$32,405.76	$10,974.17	$36,835.85	
C. Alvarado*	$4,193.20	1.366667	$5,730.71			($9,673.55)
N. Raby**	$4,193.20	5.5	$23,062.60	$4,529.29	$17,875.50	$657.81
T. Roz	$3,375.60	10.966667	$37,019.08	$8,600.16	$29,000.85	($581.93)
A. Torreliza	$3,375.60	10.966667	$37,019.08	$6,766.61	$30,769.06	($516.59)
C. Ajero	$3,254.40	10.966667	$35,689.92	$6,958.18	$29,030.14	($298.40)
T. Rabie	$1,970.60	10.966667	$21,610.91	$4,073.12	$17,909.93	($372.14)
M. Berido	$1,970.60	10.966667	$21,610.91	$4,073.12	$17,909.93	($372.14)
M. Suarez	$1,970.60	10.966667	$21,610.91	$4,073.12	$17,909.93	($372.14)
M. Cabales	$1,970.60	10.966667	$21,610.91	$3,708.42	$17,909.93	($7.44)
M. Marquez	$1,477.40	10.966667	$16,202.15	$3,188.05	$13,401.53	($387.43)
L. Bonnit	$1,477.40	10.966667	$16,202.15	$3,500.65	$13,011.00	($309.50)
H. Banogon	$1,477.40	10.966667	$16,202.15	$3,188.05	$13,011.00	$3.10
C. Laxina	$1,477.40	10.966667	$16,202.15	$3,500.65	$13,011.00	($309.50)
			$322,179.42	$67,133.59	$267,585.65	($12,539.82)

*PROMOTED JANUARY 6, 1990
**JOINED VESSEL SEPTEMBER 2, 1989

EXCERPTS FROM PLAINTIFFS/APPELLEES' ORIGINAL BRIEF ON MERITS (BACK WAGES)

Pages 54, line 8, through 57, line 3

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The documentary evidence clearly establishes that the Plaintiffs worked from March 19, 1989 to their date of discharge by operation of law, January 30, 1990. The Plaintiffs continued to work on the vessel until they were signed off on February 8, 1990. The Plaintiffs remained in Oregon until their repatriation on February 14, 1990, and arrived back in Manila on February 16, 1990. The Defendants contended at the trial that the applicable contract of employment was either the individual employments contracts signed in blank or, alternatively, the AMOSUP Collective Bargaining Agreement. Plaintiffs argued that even if AMOSUP Collective Agreement was in any way relevant, it contained a "savings clause" entitling the Plaintiffs to any "terms and conditions" which are, taken as a whole, recognized by the ITF as more favorable to the seafarer, to enjoy such terms and conditions (Tr. Ex. 3, Special Agreement, Art. 1(b) and Tr. Ex. 32B). That same agreement, the AMOSUP Collective Bargaining Agreement that the Defendants attempted to urge upon the court at the trial provides that wages shall commence on "departure from Manila" and continue to the date of arrival back in Manila. Each of the 13 Plaintiffs arrived back in Manila on February 16, 1990. As such, all that is needed is a mathematical calculation to determine the amount of wages that were due each Plaintiff, and subtract therefrom the partial

wages that were paid each month and the wages that were paid on February 8, 1991. The parties have repeatedly stipulated that the calculation of the wages due to Plaintiffs is simply a matter of math and the court could make those calculations itself (Tr. 56; 15-24, 66: 2-11). The math utilized by the Defendants is correct if one were to ignore the express language of the collective bargaining agreement that requires that wages be computed on a 30 day month, and not the actual number of days in the month (Tr. Ex. 9; ER 210).[17] As such, the Defendants' figures are in error by utilizing the actual days per month instead of the 30 day month stipulated in the collective bargaining agreement, and further in not computing the wages for the entire 335 day period of time from the seamen's employment from March 19, 1989 to their arrival back in Manila on February 16, 1990. The court made a factual finding as to the amount of each Plaintiff's past due wages, and accepted Dr. Rice's method of calculation that all parties agreed was simply a matter of math. The court made its own findings as to the number of days worked, which was 334 days which equals 11.1333 months of employment times 30 days per month per the collective bargaining agreement, and not the 10.9907 months of employment utilized in Dr. Rice's initial calculations and trial testimony. As such, the court made a finding that the Plaintiffs were employed and entitled to wages for 11.1333 months in determining the amount of wages earned. Once the amount of monthly partial pay is subtracted, along with the amount

[17] The Defendants' calculations contained in the addendum section of their brief were not introduced into evidence or contained in the record of this proceeding and should be stricken. However, because the Defendants used the wrong days per month and the incorrect days of employment, they reached the wrong result even if considered by the court.

of pay to each seaman on February 12, 1991, the following balances are due to the 13 individual Plaintiffs:

Camilo Alvarado	$(7,235.88)
Nelson Raby	$2,894.19
Teofanis Roz	$1,555.95
Apolonio Torreliza	$1,621.29
Leo Ajero	$1,762.72
Teodoro Rabie	$2,894.19
Modesto Berido	$875.91
Marcelo Suarez	$875.91
Miguelto Cabales	$1,240.61
Teodoro Marquez	$548.26
Leonardo Bonnit	$626.19
Hermenigildo Banogon	$938.79
Cervasito P. Laxina	$626.19

The trial court erroneously added the overpayment to Mr. Alvarado instead of subtracting it which resulted in the collective award of $15,000. This was solely a mathematical error. Twelve of the thirteen Plaintiffs were collectively owed the sum of $9,224.32 and Mr. Alvarado was overpaid $7,235.88.

The evidence before the trial court consisted of the undisputed pay records, the collective bargaining agreements, the period of time of each Plaintiffs' employment, and Dr. Rice's methodology of calculation which was only a matter of math. The court made its own calculations that are clearly supported by the evidence that the Plaintiffs are collectively owed past due wages of $9,224.32. Under the ruling of this Court of October 30, 1990, 918 F.2d 80, penalty wages were to accrue until all wages were paid into the registry of the court. Defendants have only themselves to blame for not having made the correct payment to the Plaintiffs. If the Defendants